No. 77-1117

In the Supreme Court of the United States

OCTOBER TERM, 1977

HEATHER MCFADYEN-SNIDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

CITATIONS

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OPINIONS BELOW

The opinion of the court of appeals reversing petitioner's conviction (Pet. App. A) is reported at 552 F. 2d 1178. The order of the court of appeals affirming the district court's denial of petitioner's motion to dismiss the indictment (Pet. App. B) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1977. A petition for rehearing was denied on January 13, 1978 (Pet. App. C). The petition for a writ of certiorari was filed on February 9, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, retrial of petitioner following reversal of her conviction on appeal is barred by the Double Jeopardy Clause of the Fifth Amendment.

STATEMENT

1. After a jury trial in the United States District Court for the Middle District of Tennessee, petitioner was convicted of wire fraud, in violation of 18 U.S.C. 1343, mail fraud, in violation of 18 U.S.C. 1341, and making a false statement for the purpose of influencing a federally-insured bank, in violation of 18 U.S.C. 1014. She was sentenced to concurrent terms of five years' imprisonment. The charges stemmed from petitioner's scheme to defraud the Hamilton Bank of Nashville, Tennessee ("the bank") by inducing the bank to extend overdraft credit to petitioner based on petitioner's false representations concerning her financial status and business dealings.

The evidence at trial showed that in early 1974 petitioner requested the bank's assistance in connection with an international transaction involving the sale of several million metric tons of rice (Tr. 22-26). In May 1974, petitioner came to Nashville and opened three checking accounts at the bank by drawing two checks totalling $6,300 on a Florida bank account. Those checks were later returned unpaid for insufficient funds and the bank did not receive payment on them until March 1976 (Tr. 61-62). Petitioner also submitted to the bank a notarized financial statement in which she claimed to own over $800,000 in assets, primarily consisting of real estate holdings. In truth, petitioner did not own any of this property (Tr. 208-216), a fact that the bank did not discover until later in 1974 (Pet. App. 3a). On the basis of

petitioner's financial statement, her commercial account was referred to the international department of the bank (Tr. 28-32).

On May 23, 1974, John Andresen, manager of the bank's international department, travelled to England with petitioner for the purpose of inquiring about the prospective buyers for petitioner's rice and other commodities and to initiate contacts with the British banks that would be issuing letters of credit. Petitioner had agreed to pay Andresen's expenses on this trip (Tr. 120). Andresen returned to the United States two days later but left again on May 30 and remained in England until June 13 (Pet. App. 4a). Petitioner's check to the airline in payment for Andresen's first airplane ticket was returned for insufficient funds (Tr. 124-125). Andresen's second airline ticket was cancelled because petitioner's check had been returned unpaid (Tr. 127).

While in England, Andresen was unable to confirm petitioner's ownership of any commodities (Tr. 127). In addition, petitioner never produced any warehouse receipts for the commodities despite her repeated assurances that they would be furnished to the bank upon her return to the United States (Tr. 129). As a result of a trans-Atlantic telephone call between petitioner, Andresen, and other officials of the bank, the bank agreed to extend to petitioner a $25,000 credit to cover overdrafts in her checking accounts (Tr. 39-40, 65-66, 79-80, 130, 357). In return, petitioner executed a promissory note for $25,000 (Tr. 134). Petitioner ultimately used about $20,000 of the authorized credit and repaid $5,300 (Tr. 44, 61).

Petitioner conceded at trial that she owed the bank money but denied that she had had any intent to defraud the bank in obtaining the $25,000 extension of credit (Tr.

313-317, 362-369, 382, 384-386, 390-392, 467, 623). On direct examination petitioner testified extensively about her relationship with two of her "husbands," who allegedly had provided her with most of the properties listed on her financial statement.[1] Petitioner stated that in May 1968, during a period in which she was undergoing cancer surgery, her second "husband," H. Malcolm Teare, presented her with a "declaration of trust" purporting to transfer a 25 percent interest in several parcels of real property upon Teare's death (Tr. 426-428, 433, 527).[2] This future interest, valued at $860,300, was listed as a current asset on petitioner's financial statement

[1]Petitioner testified (without providing any supporting documentation) that she was married three times and that each marriage had ended in annulment (Tr. 411, 417, 422, 439, 442-443, 541). She acknowledged that on one occasion she had assisted a man named Carl Ray to obtain a bank loan by posing as Ray's wife (Tr. 508-509). She also admitted that her resume, which was submitted to the bank together with her financial statement, falsely stated that she was a widow (Tr. 540-541).

[2]Petitioner testified that she gave a photocopy of the declaration of trust to attorney Robert Dixon in 1968 and that in May 1976, one month before trial, she obtained a copy of that document from Dixon (Tr. 435-437). Dixon testified, however, that petitioner had never given him a copy of the 1968 document, but that in May 1976 petitioner had asked him to prepare a declaration of trust and that he had prepared such a document on the basis of deeds and instructions provided by petitioner (Tr. 600-604, 607). The document prepared by Dixon was to be executed by Teare after its delivery to petitioner in June 1976 (Tr. 605). Teare had been declared incompetent in 1974 (Tr. 209), a fact that petitioner failed to mention to Dixon (Tr. 609). The declaration of trust that petitioner claimed she had received from Teare and had given to Dixon in 1968 (Deft. Ex. 9) is a verbatim version of the document (Govt. Ex. 21) actually prepared by Dixon in 1976 (Tr. 606-607). Petitioner later admitted that she did in fact have Dixon prepare a declaration of trust several weeks before trial (Tr. 611-616).

filed with the bank (Tr. 431, 446-447, 527-528).[3] Petitioner's financial statement also listed as additional income annual "alimony" payments of $20,000 from her third "husband," Wilbur Snider (Govt. Ex. 2). Petitioner testified that she dated Snider in Florida in early 1968 when she was undergoing cancer surgery (Tr. 441). This was the same period during which petitioner's second "husband" (Teare) allegedly gave her the declaration of trust; according to petitioner there was "competition between the two" (Tr. 441).

On rebuttal, Nancy Ladner, petitioner's former secretary, testified for the government that petitioner had told her that at about the time of her cancer operation two rich men had been competing for her favors over a period of a year and that she had made $25,000 as a result of these relationships (Tr. 571-573). Petitioner initially objected to this testimony on the ground that it constituted proof of petitioner's alleged involvement in prostitution at the Democratic National Convention in Miami in 1972, a subject that the district court had earlier advised the prosecutor to avoid (Tr. 572).[4] The prosecutor explained that Ladner's testimony concerned an entirely different incident and that he had instructed the witnesses "not to mention prostitution or anything about the other"

[3]Petitioner claimed that, when presenting her financial statement, she "always explained" that her interest in Teare's properties was contingent upon his death (Tr. 527, 529).

[4]During the previous colloquy concerning the admissibility, for impeachment purposes, of petitioner's statement describing her prostitution activities, neither the district court nor defense counsel expressed the view that such evidence was irrelevant. Instead, the court characterized the evidence as "overkill" since there were numerous other ways in which petitioner's credibility could be attacked (Tr. 532-533; Pet. App. 6a-7a).

(Tr. 572). Both the court and defense counsel expressed satisfaction with the prosecutor's explanation (*ibid.*). Thereafter, Joe Landrum, who had shared an office and lived with petitioner in 1973, testified that petitioner told him that she had "sold herself to prominent, wealthy men" (Tr. 575). According to Landrum, petitioner had added, "how do you think I got these rich husbands and I am in the financial position I am now?" (Tr. 576). Petitioner had identified her rich "husbands" as Snider and Teare (*ibid.*).

2. On appeal, petitioner contended that she "was denied a fair trial by the erroneous admission of evidence to the effect that she had been a prostitute; * * * that evidence concerning her writing bad checks was unrelated to the offenses charged in the indictment;[5] and that the trial judge assumed the role of the prosecutor in extensively cross-examining witnessess and commenting on [petitioner's] credibility * * *" (Pet. App. 2a). The court of appeals reversed petitioner's conviction and remanded the case for a new trial, holding that the "testimony concerning [petitioner's] prostitution, and the repeated introduction of evidence of [petitioner's] writing of bad checks, independently are reversible error" (*id.* at 13a). The court did not address the propriety of the trial judge's actions during trial, noting that "it is unlikely that the District Judge would want to try this case again" (*ibid.*).

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[5]At trial Ladner and Landrum testified that in 1973 petitioner had given them checks that remained unpaid either because of insufficient funds or due to closed or non-existent bank accounts (Tr. 240-243, 256-257). In addition, petitioner was cross-examined about a check bearing petitioner's signature that had been drawn on a non-existent account (Tr. 499-501).

Prior to the retrial petitioner moved to dismiss the indictment on the ground that the Double Jeopardy Clause of the Fifth Amendment barred further prosecution following the reversal of her conviction on the ground of prosecutorial misconduct. The district court denied the motion. Petitioner immediately appealed (see *Abney* v. *United States*, 431 U.S. 651), and the court of appeals affirmed (Pet. App. 14a-16a).

ARGUMENT

Petitioner contends that the reversal of her conviction resulted from prosecutorial misconduct "design[ed] to provoke a mistrial in order to strengthen the government's position at a later trial" (Pet. 11) and that a retrial is therefore prohibited by the Double Jeopardy Clause.[6]

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[6]Petitioner also argues that the trial judge's active participation in the trial was improper and was similarly "designed to provoke a motion for mistrial" (Pet. 21-22). However, not only did petitioner not move for a mistrial, but also the conduct of the trial judge was not the basis for the reversal of petitioner's conviction and the granting of a new trial, since the court of appeals expressly declined to reach the issue (Pet. App. 13a, 15a). Accordingly, petitioner's allegations of judicial impropriety, which were not passed upon by the court below, are not appropriately presented for review by this Court.

In any event, the trial record discloses that while the district court did take an active role in the examination of witnesses, its participation in the proceedings was for such proper purposes as clarifying uncertainties in the testimony and eliciting direct answers from unresponsive witnesses, including bank officials as well as petitioner (see, *e.g.*, Tr. 25-26, 28-29, 55-56, 62-63, 102-103, 122, 124-127, 137-140, 145-146, 149, 153-154, 161-162, 191-192, 255-257, 305-306, 307-308, 317-318, 323-324, 343-344, 347-349, 351-352, 357, 358-359, 365-366, 368-369, 370-371, 380, 381-382, 392-394, 398-400, 401-403, 404-407, 424-425, 433-435, 442-443, 453-454, 460-461, 500-501, 530-531, 540-541). The trial judge's efforts were aimed at uncovering the truth and assisting the jury in its fact-finding function (*United States* v. *Liddy*, 509 F. 2d 428, 438 (C.A.D.C.), certiorari denied, 420 U.S. 911), and therefore, even if erroneous, did not represent the kind of overreaching that might bar petitioner's retrial. See, *e.g.*, *United States* v. *Weaver*, 565 F. 2d 129 (C.A. 8).

Petitioner concedes, however (Pet. 9), as she must, that a criminal defendant ordinarily may be retried after a successful appeal from a conviction without violating the policies against multiple prosecutions underlying the Double Jeopardy Clause. See *Jeffers* v. *United States*, 432 U.S. 137, 152; *United States* v. *Tateo*, 377 U.S. 463, 465; *United States* v. *Ball*, 163 U.S. 662, 672. "This Court's decisions permitting retrials after convictions have been set aside at the defendant's behest clearly indicate 'that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decisionmaking resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error.' " *United States* v. *Dinitz*, 424 U.S. 600, 610 n. 13, quoting from *United States* v. *Jorn*, 400 U.S. 470, 484 (plurality opinion). See *United States* v. *Tateo*, *supra*, 377 U.S. at 466.

At the same time, the Court has suggested that a second trial may be barred by the Double Jeopardy Clause in the event of deliberate prosecutorial misconduct calculated to provoke a mistrial request and thereby to subject the defendant to a successive prosecution in which the government might have a more favorable opportunity to obtain a conviction. See *United States* v. *Dinitz*, *supra*, 424 U.S. at 611; *United States* v. *Jorn*, *supra*, 400 U.S. at 485 n. 12. Thus, where a prosecutor has introduced into evidence "a known false exhibit" (*United States* v. *Kessler*, 530 F. 2d 1246, 1257 and n. 21 (C.A. 5)), read to the jury irrelevant and highly prejudicial portions of the defendant's grand jury testimony despite prior assurances to the district court that such material had been excised (*United States* v. *Martin*, 561 F. 2d 135 (C.A. 8)), or breached a specific agreement not to present certain evidence (*United States* v. *Broderick*, 425 F. Supp. 93 (S.D. Fla.)), the courts have held that such deliberate

misconduct amounted to prosecutorial overreaching and that a second prosecution was prohibited following the declaration of a mistrial at the defendant's behest. On the other hand, the courts have concluded that errors by the prosecutor do not constitute overreaching, and hence do not prevent a retrial following the declaration of a mistrial, in the absence of any evidence of "evil motive" on the part of the government. See *United States* v. *Crouch*, 566 F. 2d 1311, 1316-1321 (C.A. 5); *United States* v. *Buzzard*, 540 F. 2d 1383, 1387 (C.A. 10), certiorari denied, 429 U.S. 1072; *United States* v. *Wilson*, 534 F. 2d 76 (C.A. 6). See also *Divans* v. *California*, No. A-91, decided July 28, 1977 (Rehnquist, Circuit Justice); *United States* v. *Martin*, *supra*, 561 F. 2d at 141-142 (Henley, J., dissenting); *Moroyoqui* v. *United States*, C.A. 9, No. 77-1505, decided December 27, 1977, pending on petition for a writ of certiorari, No. 77-1375.

Clearly the vast majority of prosecutorial errors leading to mistrials or to reversals of convictions on appeal are not of such magnitude as to preclude reprosecution on double jeopardy grounds. Our adversary system properly demands a certain amount of zeal on the part of both prosecutor and defense counsel in the trial of a criminal case. It is only where overzealous conduct on the part of a prosecutor in an effort to secure a conviction materially prejudices the defense that courts rightly refuse to sustain a conviction. That there are bound to be reversals of criminal convictions—or mistrials—based on prosecutorial misconduct is a fact of life that our system has traditionally recognized and accepted. See, *e.g.*, *United States* v. *Dinitz*, *supra*, 424 U.S. at 608-610.[7] Not

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[7] Indeed, "[f]rom the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused

every instance of prosecutorial misconduct, however, implicates the interests served by the Double Jeopardy Clause. It is only "when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused" that double jeopardy considerations become relevant. *Arizona* v. *Washington*, No. 76-1168, decided February 21, 1978, slip op. 11. "Any order granting a mistrial at the behest of a defendant in a criminal case is typically based upon error or misconduct on the part of other counsel or the court. In order to elevate such a typical order into one which could form the basis of a claim of double jeopardy, it must be shown not only that there was error, which is the common predicate of all such orders, but that such error was committed by the prosecution or by the court for the purpose of forcing the defendant to move for a mistrial." *Divans* v. *California*, *supra*.

This is surely not the case here. Unlike in *Kessler*, *Martin* or *Broderick*, the prosecutor did not violate any prior understanding with the court or the defense, nor did he seek to introduce false evidence, As the trial transcript clearly indicates, his conduct was not calculated either to provoke a mistrial or to avert an acquittal by means known to him to be unfair. If the prosecutor erred, he was motivated solely by a good faith desire to obtain a conviction, a motivation that does not offend double jeopardy concepts. There is thus no bar to petitioner's retrial.

Indeed, there is substantial doubt whether the prosecutor's conduct even justified the reversal of petitioner's conviction. Both petitioner and the court

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irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendant's rights as well as society's interest." *United States* v. *Tateo*, *supra*, 377 U.S. at 466.

below mistakenly equate the rebuttal testimony of Ladner and Landrum concerning petitioner's relationships with wealthy men in 1968 with the proffered but unoffered evidence of "prostitution" in 1972 that the district court had described as "overkill." In fact, once the district court and petitioner's trial counsel had been apprised of the distinction between the proffered evidence and the evidence that was actually introduced, they appeared satisfied with the relevance of the rebuttal evidence (Tr. 572).

Moreover, petitioner opened the door to introduction of the government's rebuttal evidence by testifying that in 1968 there had been competition between the two "husbands" from whom she allegedly had obtained the bulk of the assets listed on her financial statement. Both "husbands" were unavailable to testify in contradiction of petitioner's claims. In order to rebut petitioner's version of her relationships with wealthy "husbands," the government called two witnesses who related petitioner's prior admissions that "rich men were in competition with each other dating her" in 1968 (Tr. 571-573) and that she had gotten her "rich husbands" by selling herself to rich men (Tr. 575-576). This evidence showed that on previous occasions, when not motivated to construct a defense in a criminal case, petitioner had spoken about her relationships with these men in a manner at odds with her trial testimony.

Thus, even assuming that the rebuttal evidence should not have been introduced because of the possibility that the jury might have concluded that petitioner had engaged in prostitution, the error was not the result of prosecutorial overreaching. There is simply no basis for concluding, from this record, that the prosecutor was motivated by a desire to harass petitioner through

repeated prosecutions or to increase the likelihood of conviction by bringing about a second trial. Accordingly, retrial of petitioner following the reversal of her conviction would not offend the Double Jeopardy Clause.[8]

[8]Furthermore, the admission of evidence of petitioner's prior misconduct in passing bad checks is not indicative of prosecutorial bad faith and does not justify immunizing petitioner from further prosecution. Petitioner denied at trial any awareness that the checks with which she opened her accounts at the Hamilton Bank had been drawn on accounts with insufficient funds. The evidence of similar acts was clearly probative of petitioner's intent to defraud the bank, and its admissibility was within the district court's discretion. Fed. R. Evid. 404(b). See, *e.g.*, *United States* v. *Birrell*, 447 F. 2d 1168, 1172 (C.A. 2), certiorari denied, 404 U.S. 1025; *Suhl* v. *United States*, 390 F. 2d 547 (C.A. 9), certiorari denied, 391 U.S. 964; *Koolish* v. *United States*, 340 F. 2d 513 (C.A. 8), certiorari denied, 381 U.S. 951. While the court of appeals ultimately concluded that the district court had abused its discretion in admitting the evidence, this is the sort of evidentiary error that commonly results in retrials.

Finally, although the court below observed that the prosecutor's conduct "deprived [petitioner] of a fair trial" (Pet. App. 11a; see also *id.* at 9a), this statement, which presumably could be made in virtually every case in which a conviction has been reversed because of trial error, is insufficient standing alone to bar a retrial. See *United States* v. *Dinitz*, *supra*, 424 U.S. at 610 n. 13; *United States* v. *Jorn*, *supra*, 400 U.S. at 474. Absent some evil motive on the part of the prosecutor in committing the error, society is entitled to vindicate its "interest in punishing one whose guilt is clear after he has obtained [a fair] * * * trial." *United States* v. *Tateo*, *supra*, 377 U.S. at 466.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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*The Solicitor General is disqualified in this case.

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